LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 5 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term 1966

No. 1264

TERRYANE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien and LOLA O'BRIEN, *Petitioners*,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of Montana

Brief of Respondents In Opposition

EDWIN S. BOOTH

CORDELL JOHNSON
301 First National Bank Bldg.
Helena, Montana

HARRY BURNS
Chinook, Montana
Attorneys for Respondents.

INDEX

i

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved .. 3

Statement 3

Argument 4

1. There was no improper denial of the right of trial by jury 5
2. There was no denial of due process or of equal protection of the law 11
3. There was no substantial federal question 14

Conclusion 17

Appendix i

Constitution of the State of Montana, Article VIII, Section 2 i

Constitution of the State of Montana, Article VIII, Section 3 i

Montana Rules of Civil Procedure, Rule 50 ii

CITATIONS

CASES

Allen v. Arguimbau
198 U.S. 149, 25 S.Ct. 622, 49 L.Ed. 990 15

Black v. Cutter Lab.
351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 16

Page

Brown v. State of New Jersey
115 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119 12

Brunet v. S. S. Kresge Co.
7 Cir. 1940, 115 F. 2d 713 10

Cincinnati, Portsmouth, Big Sandy & Pomeroy v. Bay
200 U.S. 179, 26 S.Ct. 208, 50 L.Ed. 428 15

Cogswell v. Chicago & E. I. R. Co.
7th Cir. 1946, 153 F. 2d 94 10

Consolidated Gold & Sapphire Mining Co. v. Struthers
111 Pac. 152, 41 Mont. 565 ..... 6, 7

Cox v. City of Freeman
8th Cir. 1963, 321 F. 2d 9

Fay v. Noia
372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 16

Galloway v. United States
391 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 9

Hannigan v. Northern Pacific
142 Mont. 335, 384 P. 2d 493 13

Henry v. State of Mississippi
379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 16

Herb v. Pitcairn
324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 16

Hayes v. Missouri
120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 12

Hernandez v. C. B. & Q.
144 Mont. 585, 398 P. 2d 953 13

Page

Honeyman v. Hanson
300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476 15

Lisenba v. California
314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 15

Lynch v. New York Ex rel Pierson
293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 15

Massachusetts Mutual Life Ins. Co. v. Pistolese
9th Cir. 1947, 160 F. 2d 668 10

McIntosh v. United States
10 Cir. 1965, 341 F. 2d 444 9

Montforten v. Northern Pacific Ry Co.
138 Mont. 191, 355 P. 2d 501 14

Montgomery Ward & Co. v. Duncan
311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 10

New York Times Co. v. Sullivan
376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 9

Northern Pac. R. R. Co. v. Bebert
116 U.S. 642, 6 S.Ct. 590, 29 L.Ed. 755 12

O'Brien v. Great Northern Ry Co.
145 Mont. 13, 400 P. 2d 634 14

Republic Pictures Corp. v. Koppler
151 F. 2d 543, affirmed 66 S.Ct. 523, 327 U.S.
757, 90 L.Ed. 991 12

Sztaba v. Great Northern
147 Mont. 185, 411 P. 2d 379 13

Waggeman v. General Finance Co.
3rd Cir. 1940, 116 F. 2d 254 ..... 10, 11

Page

Wolfe v. Northern Pacific Ry. Co.
147 Mont. 29, 409 P. 2d 528 8

STATUTES, CONSTITUTIONAL PROVISIONS AND MISCELLANEOUS

Seventh Amendment, Constitution of United States 8, 9, 17

Fourteenth Amendment, Constitution of United States 11, 15

Constitution of Montana, Article VIII, Section 2 ..... 3, 6

Constitution of Montana, Article VIII, Section 3 ..... 3, 6

Revised Codes of Montana 1947, Section 93-216 .. 6

Montana Rules of Civil Procedure, Rule 50 9

Annotation 85 L.Ed. 167 10

In the Supreme Court of the United States

October Term 1966

No. 1264

TERRYANE O'BRIEN, a Minor, SHERMAN O'BRIEN, a Minor, MARLYS O'BRIEN, a Minor, by their Guardian ad Litem, Lola O'Brien and LOLA O'BRIEN, *Petitioners*,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, JOHN S. JOHNSON, and GEORGE M. D'HOOGE, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of Montana

Brief of Respondents In Opposition

OPINIONS BELOW

Petitioners have correctly referred to the opinion below which appears as Appendix I to the Petition (Reported in 421 Pacific 2d 710). Reference is likewise made to the prior opinion which is printed as Appendix II to the Petition (Reported in 145 Mont.

13. 400 Pacific 2d 34). The prior opinion cannot be considered in connection with the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Are the petitioners deprived of due process of law, where the trial Court submits a case to the jury, which returns a verdict for the petitioners, when the highest Court of the State on appeal determines that, considering the evidence in the light most favorable to petitioners, the trial court erroneously submitted the case to the jury, and should have granted a directed verdict and the appellate court then directed reversal of the judgment and entry of judgment for respondents?

2. Have petitioners been deprived of equal protection of the law, where the Supreme Court of Montana reverses a judgment entered on a jury verdict and directs judgment for respondents, when the Court decides as a matter law, after considering all the evidence introduced by petitioners (plaintiffs below) that petitioners' decedent was guilty of contributory negligence as a matter of law which barred recovery?

3. Does the Supreme Court of Montana have the duty and authority to reverse a judgment based on a jury verdict which is not supported by sufficient evidence or which is contrary to law? When the Court decides the evidence shows that directed verdict should have been entered have the petitioners been deprived of a jury trial in violation of the constitutional provisions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions set for on pages 3 to 5 of the Petition, Sections 2 and 3, Article VIII, Constitution of Montana are set forth in the Appendix.

STATEMENT

This litigation involved an action to recover damages for wrongful death of petitioners' decedent, who was killed in a railroad crossing accident. The Petition refers to the fact that the case was tried by a jury which returned a verdict for plaintiffs. On appeal, the judgment was reversed and the case was remanded for a new trial. The second trial before a jury likewise resulted in a verdict for petitioners. The first trial by jury and the appeal are not involved in this Petition. Respondents limit their considera-

tion in the petition for certiorari directed to the opinion of the Supreme Court of Montana rendered on December 29, 1966. (Pet. App. 1, p. 13).

The opinion of the Supreme Court of Montana states that it only considered the question of contributory negligence as a matter of law and the refusal of the trial court to grant a directed verdict. The Court states that upon a motion for directed verdict the evidence must be viewed from a standpoint most favorable to the prevailing party and every fact must be deemed to be proved which this evidence tends to prove (Pet. App. 1, p. 17).

The Court opinion shows that this generally accepted principle was followed. All disputed testimony was considered in the light most favorable to the petitioners. The Court then concluded, on the basis of plaintiffs' own evidence, decedent was guilty of contributory negligence as a matter of law. Under these circumstances, the Court held that the trial court should have directed verdict for respondents and therefore reversed the judgment and dismissed the Complaint.

ARGUMENT

The grounds advanced by petitioners for granting the writ of certiorari are wholly insufficient to warrant the issuance of the writ because the opinion of Supreme Court of Montana accords with prior de-

cisions of this Court and also because that decision has no significance beyond this single case. There is no substantial federal question and the opinion below rests upon adequate non-federal grounds. We will discuss in order, (1) the alleged denials of right of trial by jury; (2) the asserted denial of due process of law and equal protection of the law and (3) the lack of a substantial federal question.

1. THERE WAS NO IMPROPER DENIAL OF THE RIGHT OF TRIAL BY JURY

The second trial of this case was before a jury. At the conclusion of petitioners' case in chief, defendants, respondents here, moved for a dismissal and this was denied by the trial court (Tr. 201, 206). At the close of the case motion was made for directed verdict (Tr. 366). It was and is the opinion of the respondents the evidence showed decedent was guilty of contributory negligence as a matter of law and the case should not be submitted to the jury. However, the case was submitted to the jury and the appeal to the Montana Supreme Court followed. The opinion of the Court (Pet. App. 1, p. 13) shows the Montana Supreme Court considered all the evidence in the light most favorable to decedent and found that, as a matter of law, plaintiffs' decedent was guilty of contributory negligence. The Court reversed the judgment and ordered dismissal of the case. The Montana Court

was not testing the credibility of witnesses or weighing the evidence. It decided the case on undisputed evidence which showed contributory negligence as a matter of law.

The action in reversing the judgment and entering judgment is within the authority granted the Court by Article VIII, Sections 2 and 3 of the *Constitution of Montana*, Appendix, and *Revised Codes of Montana*, 1947, 93-216 (Pet. p. 4).

The Petition cites *Consolidated Gold & Sapphire Mining Co. v. Struthers*, 111 Pacific Reporter 152, 41 Mont. 565. The case is not authority for the principle stated. The complete rule is as follows:

> "This court has repeatedly held that the right guaranteed by the state Constitution (Article III, Sec. 23) is the same as that guaranteed by the federal Constitution (Seventh Amendment), because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state, and the right as it then existed was preserved in the state Constitution. (Citations). Of course, the parties may waive the right and submit their controversy to the court; but this may be done only in the mode prescribed by law. (Constitution, Art. III, sec. 23; Revised Codes, sec. 6762; *Chessman v. Hale, supra.*) Otherwise the judge has no power to substitute himself in the place of the jury. This right has always been jealously guarded. (Citations). Under section 250, Division 1, Com-

piled Statutes of 1887, the parties were entitled to a trial by jury of the issues of fact in actions for the recovery of real property; and this is to say that, whenever in a given case the evidence is such that reasonable men may disagree as to the proper inference to be drawn from it, it must have been submitted to the jury. The jury, and not the court, must weigh and decide. *But it has always been the practice in this jurisdiction that, when the evidence on the part of the plaintiff does not tend to establish the cause of action stated in the complaint, the court may direct a verdict or take the case from the jury and enter a judgment of nonsuit. In such case there is nothing for the jury to find.* (Citations)." (Emphasis ours).

This same principle was stated in the opinion to which this Petition is directed. The Court stated:

"Upon a motion for a directed verdict the evidence must be viewed from a standpoint most favorable to the prevailing party and every fact must be deemed proved which the evidence tends to prove. Hernandez v. C. B. & Q. Ry., 144 Mont. 858, 398 P. 2d 953. All substantial evidence disclosed by the record which may be used to sustain the jury verdict will be given its full probative effect. (Pet. App. 1, pp. 17, 18).

* * *

As a general rule contributory engligence is a matter of defense and presents a question for the jury. Everett v. Hines, 64 Mont. 244, 208 P. 1063; Puckett v. Sherman & Reed, 62 Mont. 395,

205 P. 250. The execption to this rule arises when the evidence is of such a character that it will support no other legitimate inference so that a reasonable man or a jury following proper instructions could not come to a different conclusion . Fulton v. Chouteau County Farmer's Co., 98 Mont. 48, 37 P. 2d 1025; Boepple v. Mohalt, 101 Mont. 417, 54 P. 2d 857. If this exception arises the issue of contributory negligence becomes a matter of law to be determined by the court. We hold that the plaintiffs' case-in-chief is sufficient for a finding of contributory negligence as a matter of law." (Pet. App. 1, pp. 21, 22).

The Montana Court in *Wolfe v .Northern Pacific Ry. Co.*, 147 Mont. 29, 44, 409 P. 2d 528, quoted by counsel, stated its examination of the record will only be to determine if substantial evidence supports the verdict and judgment. The Court action was in harmony with long established constitutional, statutory and court principles in Montana.

These principles apply in Federal Courts. Courts are justified in preempting the jury's verdict only when it would have no foundation in fact and the Court, in the exercise of its judicial discretion, would be required to set it aside. Under the Seventh Amendment no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law. *Insufficiency of evidence is one of the common law grounds for directing a ver-*

dict or granting a Motion for New Trial. McIntosh v. United States, 10 Cir. 1965, 341 F. 2d 444, 447.

In *Cox v. City of Freeman*, 8 Cir. 1963, 321 F. 2d 887, 891, the Court said:

> "Plaintiff contends that the trial court erred in directing a verdict for the defendant because it deprived him of right of trial by jury which is guaranteed by the Seventh Amendment to the United States Constitution. *This argument is not legally nor practically sound. A directed verdict does not deprive the plaintiff of any right guaranteed to him by the Seventh Amendment to the United States Constitution.* Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077. 87 L.Ed. 1458 (1943)." (Emphasis ours).

See: *New York Times Co. v. Sullivan*
376 U.S. 254, 285, 84 S.Ct. 710,
11 L.Ed. 2d 686, 709.

A review of the tests of the sufficiency of proof by motion or by directed verdict as contrasted to the Seventh Amendment is contained in *Galloway v. United States*, 391 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458. That case holds that the Seventh Amendment does not deprive Courts of the power in a jury case to direct a verdict on the ground of insufficiency of evidence.

Montana has adopted the Federal Rules of Civil Procedure. Rule 50, *Montana Rules of Civil Procedure* (Appendix) is identical with the federal rule.

Respondents made a Motion for Directed Verdict at the end of the trial (Tr. 366) and moved to set aside the verdict and enter judgment in accordance with the Motion for Directed Verdict (Tr. 418). The power of the appellate court to reverse a jury verdict and enter judgment for the moving party under the rules was upheld in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (see Annotation in 85 L.Ed. 167, 168).

See also: *Brunet v. S. S. Kresge Co.*
7 Cir. 1940, 115 F. 2d 713.

Cogswell v. Chicago & E. I. R. Co.
7 Cir. 1946, 153 F. 2d 94.

Massachusetts Mutual Life Ins. Co. v. Pistolese
9th Cir. 1947, 160 F. 2d 668.

The rule is stated in *Waggeman v. General Finance Co.*, 3rd Cir. 1940, 116 F. 2d 254, 257 where it is said:

> "The appellant reserved its point of law as to its liability by requesting a directed verdict, Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which the trial judge refused, and assigns for error the trial court's denial of its motions for judgments n.o.v. It is our duty to determine whether the action of the court below was proper and, if not, we direct the entry of the appropriate judgment. Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177; Baltimore & C. Line v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636.

A verdict should not be allowed to stand if after resolving all inferences from the evidence most strongly against the one complaining of the verdict, there appears to be no legal substance to support it. Gulf, M. & N. R. Co. v. Wells, 275 U.S. 455, 48 S. Ct. 151, 72 L.Ed. 370; Chicago, M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 46 S. Ct. 564, 70 L.Ed. 1041." (Emphasis ours).

Whether the facts are viewed in the light of the provisions of the Montana Constitution or the Federal Constitution, a directed verdict does not deprive the plaintiffs of a trial by jury. Had the trial Court granted a Directed Verdict there would not have been a second jury verdict. In order to correct the error of the trial court in failing to grant the directed verdict, reversal of the judgment was necessary. The requirement of correct instructions and sustaining of the burden of proof which will support a verdict are rights a party has a right to have upheld to the same extent that a jury verdict based on adequate testimony should be upheld.

2. THERE WAS NO DENIAL OF DUE PROCESS OR OF EQUAL PROTECTION OF THE LAW.

Examination of cases relied on by counsel discloses they do not support the contention that the "due process" or "equal protection" clauses of the 14th Amendment have been violated.

Republic Pictures Corporation v. Koppler, 151 F. 2d 543, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, involved a state statute applying a different statute of limitations to a claim under a federal statute than applicable on a state claim. The case is not applicable to the question of the power or duty of the Courts or to jury trials. *Brown v. State of New Jersey*, 115 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119 was a decision relating to the manner of selecting a jury. *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 likewise applied to the method of selecting juries and the number of preemptory challenges. *Northern Pacific R. R. v. Hebert*, 116 U.S. 642, 6 S.Ct. 590, 29 L. Ed. 755 was another case involving selection of a jury and the allowance of challenges.

None of the cases cited in the Petition establish denial of "equal protection of law" or "denial of due process" where the appellate court reverses a case as a matter of law.

What was said with regard to jury verdict, above is equally applicable to the question of due process and equal protection. A contention that a jury verdict cannot be set aside and either a new trial ordered or a proper judgment, including a judgment for the other party, be entered on direction of an appellate court would be to deny the party against whom the verdict was returned, any right to have

the law correctly stated or to see that the verdict was supported by sufficient evidence and correctly applied the law to the facts.

The assertion that the Supreme Court of Montana has persistently denied trial by jury in railroad crossing accidents is not valid. Without examination of the facts in each case it could not be determined whether the Court properly applied applicable principles of law. The mere fact that six, or sixty cases, resulted in final judgments for either side would not establish a denial of due process or of equal protection of the law.

Examination of *Hannigan v. Northern Pacific*, 142 Mont. 335, 384 P. 2d 493, discloses that the case was submitted to the jury on the question of last clear chance and wilful misconduct. The Supreme Court dismissed the question of last clear chance as not applicable but returned the case for new trial on the question of wilful misconduct. A jury trial was allowed.

Sztaba v. Great Northern, 147 Mont. 185, 411 P. 2d 379, was tried to the Court, without a jury. The trial court was reversed but there was no denial of a jury trial by the opinion.

Hernandez, v: C. B. & Q., 144 Mont. 585, 398 P. 2d 953, was tried to a jury but at the close of plaintiff's

case, the trial court granted a dismissal and nonsuit and a directed verdict on the ground of insufficiency of evidence. This action was affirmed on appeal. The Supreme Court of Montana did not deny the right of trial by jury.

The first O'Brien decision, 145 Mont. 13, 400 P. 2d 634, (Pet. App. II, p .27) was returned for new trial.

Of the five cases, other than this case, referred to on page 10 of the Petition, in only one was the verdict reversed and judgment entered for the railroad. This was *Montforten v. N. P. Ry. Co.*, 138 Mont. 191, 355 P. 2d 501. Such a record does not sustain the assertion that there has been a persistent denial of right to trial by jury in cases involving railroad crossings. There has been *no denial* of "due process" or of "equal protection". Jury trials have been held. The Appellate Courts have, however, properly examined the record to determine whether the verdicts, where rendered, could be sustained. This is not a denial of jury trial, under either the state or federal constitution.

3. THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The federal questions were first raised in the Petition for Rehearing (Pet. App. III, p. 43). Respond-

ents filed objection to the Petition for Rehearing (certified to the Court, Petition page 56). This petition was denied without opinion (Pet. p. 53).

The Chief Justice of the Supreme Court of Montana issued a certificate that constitutional questions were raised in the Petition for Rehearing and that these questions were considered and the Court ruled that the constitutional rights were not violated by the action of the Court (Pet. p. 59).

In *Lisenba v. California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166, a similar certificate was held to be sufficient to give the Court jurisdiction. However, the question raised under the 14th Amendment related to improper use of confessions. In *Cincinnati, Portsmouth, Big Sandy & Pomeroy v. Bay*, 200 U.S. 179, S.Ct., 26 S.Ct. 208, 50 L.Ed. 428, the Court held that such a certificate removes the question of whether the federal question was raised too late. However, in *Allen v. Arguimbau*, 198 U.S. 149, 25 S.Ct. 622, 49 L. Ed. 990, the Court held that such a certificate was not sufficient to confer jurisdiction where the decision could have rested on two grounds, one of which was not a federal question, but a state question.

See also: *Lynch v. New York Ex rel Pierson*
293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191.

Honeyman v. Hanson
300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476.

Where independent and adequate state grounds exist to support the state Court opinion this Court will decline to review the judgment. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408. This Court should determine for itself whether judgment rests on federal or adequate state grounds. Where there is ambiguity, that interpretation will be chosen which does not present a constitutional question, *Black v. Cutter Lab.*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188.

See also: *Fay v. Noia*
372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837.

Herb v. Pitcairn
324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789.

There can be no question but that the opinion of the Supreme Court of Montana rendered on Dec. 29, 1966, was based on state grounds. No question of federal law was raised or considered in the record prior to that time. Even though the Petition for Rehearing raised federal questions, the denial of that Petition obviously rests on adequate state grounds. The right of an Appellate Court to reverse, modify or direct entry of a proper judgment based on the law has been universally recognized. The Montana Constitution and statutory law recognizes this right. The Court opinion in this case states the accepted rule as to when a directed verdict may be granted.

This action was not contrary to the state constitutional provisions relating to jury trial or to the Seventh Amendment of the United States Constitution.

The opinion in this case recognizes accepted principles relating to directed verdicts. This case could therefore only apply to this one case and no question of substantial federal right exists. When this case was returned for new trial (Pet. App. II, p. 27) the law, as laid down in that opinion was binding on the trial court and jury. In the second opinion the Montana Supreme Court found that the trial court should have found contributory negligence as a matter of law and should have granted the directed verdict. The jury cannot disregard the law of the case as set forth in the instructions. Mere repetition of a jury verdict does not correct an erroneous verdict. The Montana Supreme Court was therefore correct in reversing the judgment and directing entry of judgment for defendants.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWIN S. BOOTH

CORDELL JOHNSON
301 First National Bank Bldg.
Helena, Montana

HARRY BURNS
Chinook, Montana
Attorneys for Respondents.

APPENDIX

Constitution of the State of Montana, Article VIII, Sec. 2:

> "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law."

Constitution of the State of Montana, Article VIII, Sec. 3:

> "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. When a jury is required in the supreme court to determine an issue of fact, said court shall have power to summon such jury in such manner as may be provided by law. Each of the justices of the supreme court shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme

court, or before any district court of the state, or any judge thereof; and such writs may be heard and determined by the justice or court, or judge, before whom they are made returnable. Each of the justices of the supreme court may also issue and hear and determine writs of certiorari in proceedings for contempt in the district court, and such other writs as he may be authorized by law to issue.'

Montana Rules of Civil Procedure, Rule 50:

MOTION FOR A DIRECTED VERDICT.

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside

and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Motions provided by this subdivision shall be heard and determined within the times provided by § 93-5606 of the 1947 Revised Codes of Montana in the case of motions for new trial. Amended by S.Ct. order Sept. 7, 1965, eff. Jan. 1, 1966."